Pengarah Pejabat Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan Negeri Sabah & Ors v Multi Inrich Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(W)-12–01 OF 2016
TENGKU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
12 OCTOBER 2017

Tort — Malicious prosecution — Reasonable and probable cause — Respondent's goods for business purposed confiscated, seized or detained — Respondent prosecuted for offence under the Trade Description Act 1972 — Items confiscated, seized or detained not used in criminal trial — Respondent claimed for items confiscated but was told that items were disposed of — Respondent's business suffered and threatened with legal actions by creditors — Whether court order or warrant required to enter premises — Whether appellant in breach of duty for confiscating items and disposing of same

The respondent brought an action against the appellants, inter alia, for a declaration that it had been maliciously prosecuted for an offence under the Trade Description Act 1972 ('the TDA') and for a declaration that the appellants had acted in breach of duty and/or committed negligence in confiscating, seizing, detaining or otherwise unlawfully disposing of its goods and business equipment which were later not used in the criminal trial of the respondent. The respondent contended that on 10 July 2009, the second and third appellants, without showing any court order or warrant, entered its premises and confiscated all its goods and business equipments, namely: (a) 4,016 bottles of Lactovida Premium 1,000ml; (b) 12 bottles of Lactovida Classic 1,000ml; (c) 35 gallons of Liquid Gallons; (d) 2,360 empty plastic bottles; (e) 23 bundles of Bottle Stickers; (f) one unit of Laminator Machine Model C-2301-P;(g) one unit Blower W Bule-Decker Model BHP 1500-2; and (h) 1 unit of Tape Printer Model Kunba Motor Model YY70-15. Subsequently, the respondent was charged in the sessions court with the offence of offering for sale, 881 bottles of Lactovida drink, with false trade description under s 3(1)(b) of the TDA. Nevertheless, the respondent was acquitted and discharged without its defence being called. The respondent claimed for the return of all the goods seized but was told the same had been disposed of. As a result of the raid and seizure, its business ceased to operate, and it was subsequently sued by its creditors to recover the loans that they had given to it. The respondent succeeded in its action for negligence at the High Court but failed in its action for malicious prosecution. Hence, the present appeals by the parties.

Held, allowing the appellants' appeal; dismissing the respondent's appeal:

(1) Section 22 of the TDA was wholly irrelevant to the issue and the provision that the trial judge should have directed his mind to was s 34 of the TDA. The question that called for the trial judge's determination was whether the seizure of the goods was with reasonable or probable cause. Whether or not there was reasonable or probable cause was essentially a question of fact, which must not be confused with the question whether, at the time the goods were seized, an offence under the TDA had in fact been committed by the respondent. That was a matter for the court to determine at the appropriate stage of the criminal trial and not for the appellants to determine at the point of investigation (see paras 13 & 16).

(2) To establish reasonable or probable cause, the law does not require that an offence under the TDA must have been committed before the enforcement officers could proceed to seize the goods. It was sufficient if they had an honest belief that an offence under the TDA had probably been committed. They must, in order to legitimise the seizure, have a reasonable suspicion that an offence under the TDA had been committed (see para 18).

(3) Section 28(1)(c) and (d) of the TDA gave full powers to the officers of the first appellant to seize the respondent's goods for the purpose of ascertaining whether an offence under the TDA had been committed or which they had reason to believe might be required as evidence at the trial. There was no evidence that the seizure of the goods was made other than for those purposes. The mere fact that the search warrant was not issued in the name of the respondent did not make the seizure of the goods illegal. Even without a search warrant, the enforcement officers of the first appellant, in circumstances falling under s 28(3A) of the TDA, were empowered to enter and inspect any premises and seize any goods for the purpose of an investigation (see paras 21–23).

(4) It could not be argued that the appellants had no reason to suspect that an offence under the TDA had probably been committed in relation to the goods seized, including those that were not used during the criminal trial of the respondent. It would be premature at that stage of the investigation for the seizing officers to determine which goods were in breach of the TDA and which were not and which items would be used at the trial. The fact that the respondent was eventually acquitted of the offence charged did not render the seizure illegal if otherwise it was made in accordance with s 28(1)(c) and (d) of the TDA (see paras 24 & 26).

(5) The suit was commenced almost two years after the respondent was acquitted. The respondent's claim for malicious prosecution was predicated on the assumption that it was the first appellant who made the decision to institute criminal prosecution against the respondent.

However, the power to institute criminal prosecution and the general control of criminal proceedings are vested in the public prosecutor. The respondent's claim for malicious prosecution was barred by limitation as it was filed outside the limitation period prescribed by s 3 of the Limitation Ordinance (see paras 35–36 & 38).

[Bahasa Malaysia summary

Responden mengambil tindakan terhadap perayu bagi, antara lain, deklarasi bahawa ia telah secara berniat jahat didakwa atas kesalahan di bawah Akta Perihalan Dagangan 1972 ('TDA') dan deklarasi bahawa perayu telah bertindak melanggar tugas dan/atau cuai dalam menyita, merampas, menahan atau sebaliknya, menyalahi undang-undang kerana melupuskan barang-barang dan peralatan perniagaan yang kemudiannya tidak digunakan dalam perbicaraan jenayah terhadap responden. Responden berhujah bahawa pada 10 Julai 2009, perayu kedua dan ketiga, tanpa menunjukkan apa-apa perintah atau waran mahkamah, memasuki premis responden dan merampas semua barang dan peralatan perniagaannya iaitu: (a) 4,016 botol Lactovida Premium 1,000ml; (b) 12 botol Lactovida Classic 1,000ml; (c) 35 gelen Liquid Gallons; (d) 2,360 botol plastik kosong; (e) 23 berkas pelekat botol; (f) satu unit Mesin Laminator Model C-2301-P; (g) satu unit Blower W Bule-Decker Model BHP 1500-2; dan (h) satu unit pita Pencetak Kunba Motor Model YY70-15. Selanjutnya, responden dituduh di Mahkamah Sesyen dengan kesalahan menawarkan untuk jualan, 881 botol minuman Lactovida, dengan perihal dagangan palsu bawah s 3(1)(b) TDA. Walau bagaimanapun, responden dilepaskan dan dibebaskan. Responden menuntut pemulangan semua barang yang disita tetapi diberitahu kesemuanya telah dilupuskan. Hasil serbuan dan penyitaan, perniagaannya tidak dapat lagi beroperasi dan dia kemudian disaman oleh pemiutangnya untuk mendapatkan semula pinjaman mereka berikan kepadanya. Responden berjaya dalam tindakannya untuk kecuaian di Mahkamah Tinggi tetapi gagal dalam tindakannya untuk pendakwaan berniat jahat. Oleh itu, rayuan ini oleh pihak-pihak.

Diputuskan, membenarkan rayuan perayu; menolak rayuan responden:

(1) Seksyen 22 TDA langsung tiada kaitan dengan isu ini dan peruntukan yang hakim bicara seharusnya arahkan mindanya adalah s 34 TDA. Soalan yang menuntut penentuan hakim bicara adalah sama ada penyitaan barang tersebut adalah dengan sebab yang mungkin dan munasabah. Sama ada atau tidak terdapat terdapat sebab berpatutan atau berkemungkinan adalah persoalan fakta, yang tidak boleh dikelirukan dengan persoalan sama ada, pada masa barang itu dirampas, suatu kesalahan di bawah TDA sebenarnya telah dilakukan oleh responden. Ini adalah perkara yang perlu diadili oleh mahkamah pada peringkat perbicaraan jenayah yang sesuai dan bukan untuk perayu-perayu tentukan semasa siasatan (lihat perenggan 13 & 16)

A (2) Untuk membuktikan sebab yang munasabah atau mungkin, undang-undang tidak menghendaki agar suatu kesalahan di bawah TDA mestilah dilakukan sebelum pegawai penguat kuasa boleh meneruskan untuk merampas barang tersebut. Adalah mencukupi jika mereka mempunyai kepercayaan jujur bahawa kesalahan di bawah TDA
B mungkin telah dilakukan. Mereka mesti, untuk mengesahkan penyitaan, mempunyai syak yang munasabah bahawa suatu kesalahan di bawah TDA telah dilakukan (lihat perenggan 18).

(3) Seksyen 28(1)(c) dan (d) TDA memberi kuasa penuh kepada pegawai
C perayu pertama untuk merampas barangan responden untuk tujuan menentukan sama ada suatu kesalahan di bawah TDA telah dilakukan atau bahawa mereka mempunyai alasan untuk percaya mungkin diperlukan sebagai keterangan semasa perbicaraan. Tidak ada bukti bahawa penyitaan barang dibuat selain untuk tujuan tersebut. Fakta
D semata-mata bahawa waran geledah tidak dikeluarkan atas nama responden tidak menjadikan penyitaan barang menyalahi undang-undang. Walaupun tanpa waran geledah, pegawai penguatkuasa perayu pertama, dalam keadaan yang berlaku di bawah 28(3A) TDA, diberi kuasa untuk memasuki dan memeriksa mana-mana premis dan
E merampas apa-apa barang untuk tujuan siasatan (lihat perenggan 21–23).

(4) Tidak boleh dikatakan bahawa perayu tidak mempunyai sebab untuk mengesyaki bahawa suatu kesalahan di bawah TDA mungkin telah
F dilakukan berhubung dengan barang yang disita, termasuk kesemua yang tidak digunakan semasa perbicaraan jenayah responden. Adalah pramatang pada tahap siasatan bagi pegawai-pegawai yang menyita untuk menentukan barang-barang yang melanggar TDA dan yang mana yang tidak dan yang mana yang akan digunakan dalam perbicaraan.
G Fakta bahawa responden akhirnya dibebaskan dari kesalahan yang dituduh tidak menyebabkan penyitaan menyalahi undang-undang jika selain itu ia dibuat mengikut s 28(1)(c) dan (d) TDA (lihat perenggan 24 & 26).

H (5) Saman tersebut dimulakan hampir dua tahun selepas responden dibebaskan. Tuntutan responden untuk pendakwaan berniat jahat adalah berdasarkan kepada andaian bahawa perayu pertama yang membuat keputusan untuk memulakan pendakwaan jenayah terhadap responden. Walau bagaimanapun, kuasa untuk memulakan pendakwaan jenayah
I dan kawalan am terhadap prosiding jenayah terletak pada pendakwa raya. Tuntutan responden untuk pendakwaan berniat jahat telah dibatas oleh had kerana ia difailkan di luar tempoh had yang ditetapkan oleh s 3 Limitation Ordinance (lihat perenggan 35–36 & 38).]

Notes

For cases on reasonable and probable cause, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reisue) paras 1071–1074.

Cases referred to

Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor [2008] 3 MLJ 492, CA (refd)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2013] MLJU 1644; [2013] 7 CLJ 681, CA (refd)
Government of the State of Sabah v Syarikat Raspand (suing as a firm) [2010] 5 MLJ 717, CA (refd)
Herniman v Smith [1938] AC 305, HL (refd)
Hicks v Faulkner (1878) 8 QBD 167 (refd)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66; [1977] 1 LNS 38, FC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152; [1974] 1 LNS 80, FC (refd)
Ramly & Ors v Jaffar [1968] 1 MLJ 209, FC (refd)
Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)

Legislation referred to

Limitation Ordinance (Cap 72) s 3, Schedule, item 10
Optical Discs Act 2000 s 48
Trade Description Act 1972 ss 3(1)(a), (1)(b), 22, 28(1), (1)(c), (1)(d), (3), (3A), 32, 34

Appeal from: Suit No BKI-21–6/1 of 2013 (High Court, Kota Kinabalu)

Rahazlan Affandi bin Abdul Rahim (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Trevor Kenneth Maringking (Maringking & Co) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] The respondent, Multi Inrich Sdn Bhd, sued the appellants, inter alia, for a declaration that it had been maliciously prosecuted for an offence under the Trade Description Act 1972 ('the TDA') and for a declaration that the appellants had acted in breach of duty and/or committed negligence in confiscating, seizing, detaining or otherwise unlawfully disposing of its goods and business equipment which were later not used in the criminal trial of the respondent.

A **[2]** The respondent's case was that on 10 July 2009, the second and third appellants without showing any court order or warrant entered its premises at Wawasan Plaza and Kompleks Kilang SME and confiscated all its goods and business equipment. The goods and equipment seized were the following:

B (a) 4,016 bottles of Lactovida Premium 1,000ml (with Moringa extract);

(b) 12 bottles of Lactovida Classic 1,000ml;

(c) 35 gallons of Liquid Gallons;

C (d) 2,360 empty plastic bottles;

(e) 23 bundles of Bottle Stickers;

(f) one unit of Laminator Machine Model C-2301-P;

(g) one unit Blower W Bule-Decker Model BHP 1500-2; and

D (h) one unit of Tape Printer Model Kunba Motor Model YY70-15.

[3] The respondent was later charged in the Sessions Court at Kota Kinabalu with the offence of offering for sale 881 bottles of Lactovida drink with false E trade description under s 3(1)(b) of the TDA. However, the respondent was acquitted and discharged without its defence being called on 29 April 2011, meaning to say the prosecution could not even establish a prima facie case against the respondent. There was no appeal against the decision.

F **[4]** On 12 January 2012, the respondent claimed back all the goods seized but was told by the first appellant that the goods had been disposed of in accordance with the court's direction. The respondent's grievance was that as a result of the raid and seizure, its business ceased to operate and it was subsequently sued by its creditors to recover the loans that they had given to it. G The respondent then filed the present suit against the appellants to claim for damages for the seizure and retention of goods that the prosecution did not use at the criminal trial.

[5] After a full trial in the High Court, the respondent succeeded in its action H for negligence but failed in its action for malicious prosecution. Both sides appealed to this court against the decisions, the appellants appealing against the decision finding them liable in negligence and the respondent appealing against the decision dismissing its claim for malicious prosecution.

I **[6]** Having heard arguments by both sides, both oral and written, we unanimously allowed the appellants' appeal and dismissed the respondent's appeal. These are the grounds of our decision.

[7] We shall first deal with the appeal by the appellants against the decision

finding them liable for negligence. 14 grounds of appeal were proffered by the appellants but in our view the appeal turns on s 34 of the TDA, which provides as follows:

> No person shall in any proceedings before any court in respect of the seizure of any goods seized in exercise or the purported exercise of any power conferred under this Act be entitled to the costs of such proceedings or subject to section 32 to any damages or other relief *unless such seizure was made without reasonable or probable cause*. (Emphasis added.)

[8] Section 32 referred to in the above s 34 relates to the forfeiture of goods seized under the TDA, which is not relevant for purposes of this appeal as none of the goods were forfeited pursuant to that provision. The issue for the High Court's determination in relation to the question of negligence was the following:

> Whether the defendants had acted in breach of duty and/or committed negligence by confiscating, seizing, detaining or otherwise unlawfully disposing off the plaintiff's goods and business equipment *which were not used for the trial of the charge* against the Plaintiff? (Emphasis added.)

[9] In finding the appellants to be negligent in seizing the goods that were not used by the prosecution at the criminal trial of the respondent, the learned judge gave the following reasons:

(a) there was no evidence that the unlabeled bottles contained any false description related to the complaints received from the public; and

(b) the seizure of the unlabeled bottles and ingredients were not in purported exercise of the power conferred by the TDA.

[10] In the penultimate paragraph of his judgment, the learned trial judge concluded:

> It is simply a case of negligence and gross incompetence on the part of the second and third defendants or their superior officers to seize a large amount of exhibits that are not relevant for the purpose of investigation or prosecution.

[11] So the reason why the learned judge found the appellants to be liable in negligence was due to the fact that they had seized goods that were not relevant for purposes of the investigation or prosecution. In so finding, it is clear that the learned judge focused his mind on s 22 of the TDA.

[12] It was the learned judge's view that by reason of this provision, there was no necessity for the enforcement officers of the first appellant to seize all the respondent's goods. Seizing samples would have been sufficient. It was thus wrong for them to have seized the entire stock in trade of the respondent merely

to prove a false trade description offence. Section 22 of the TDA reads:

> Taking of samples
>
> (1) Subject to any order under subsection (2), where any goods which are the subject matter of an offence under this Act are found in two or more packages or receptacles of the same description, it shall be presumed until the contrary is proved that all the packages or receptacles contain goods of the same nature, quantity and quality.
>
> (2) The Minister may by order provide that in proceedings for an offence under this Act in relation to such goods as may be specified in the order evidence on behalf of the prosecution concerning any sample procured for analysis shall not be admissible unless the sample has been dealt with in such manner as may be specified in the order.

[13] With due respect to the learned judge, s 22 is wholly irrelevant to the issue. The provision deals with a presumption of law and admissibility of evidence and has nothing to do with the question whether the appellants were liable in damages for the seizure of the respondent's goods. The provision that the learned judge should have directed his mind to was s 34 of the TDA. The operative words in this section are 'unless such seizure was made without reasonable or probable cause'.

[14] Clearly therefore, the question that called for the learned judge's determination was whether the seizure of the goods was with reasonable or probable cause. If it was, then s 34 would apply and the appellants would be immune from liability for costs and damages arising from the seizure. It would be otherwise if the seizure was made without reasonable or probable cause. In the first situation, it is irrelevant that the goods were or were not used at the criminal trial of the respondent.

[15] As for the meaning of the phrase 'reasonable or probable cause', the following dictum by Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167, which the House of Lords in *Herniman v Smith* [1938] AC 305 at p 316 approved is relevant:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

[16] The definition was adopted by Thompson LP in *Rawther v Abdul Kareem* [1966] 2 MLJ 201, a Federal Court decision. Whether or not there was reasonable or probable cause is essentially a question of fact. This must not,

however, be confused with the question whether, at the time the goods were seized, an offence under the TDA had in fact been committed by the respondent. That was a matter for the court to determine at the appropriate stage of the criminal trial and not for the appellants to determine at the point of investigation.

[17] In *Ramly & Ors v Jaffar* [1968] 1 MLJ 209 the Federal Court held that the question whether there was reasonable and probable cause must be determined objectively on the evidence before the court. The same approach was adopted by this court in *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717.

[18] To establish reasonable or probable cause, the law does not require that an offence under the TDA must have been committed before the enforcement officers could proceed to seize the goods. It was sufficient for that purpose if they had an honest belief that an offence under the TDA had probably been committed. This of course entails good faith on their part, for bad faith negates reasonable or probable cause. They must, in order to legitimise the seizure, have a reasonable suspicion that an offence under the TDA had been committed.

[19] What is meant by 'reasonable suspicion' has been explained by Lord Devlin delivering the judgment of the judicial committee of the Privy Council in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 in the following terms at p 221:

> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in *McArdle v Egan.* Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case.

[20] There is no dispute that the seizure of the respondent's goods was made pursuant to s 28(1) of the TDA, which reads:

> 28(1) Any Assistant Controller may, at all reasonable hours exercise the following powers, that is to say —
>
> (a) he may, for the purpose of ascertaining whether any offence under this Act has been committed, inspect any goods and enter any premises other than premises used only as a dwelling;
>
> (b) if he has reasonable cause to suspect that an offence under this Act has been committed, he may for the purpose of ascertaining whether it has been committed, require any person carrying on a trade or business or employed in connection with a trade or business to produce any books or

documents relating to the trade or business and may take copies of, or of any entry in, any such book or document;

(c) if he has reasonable cause to believe that an offence under this Act has been committed, he may seize and detain any goods *for the purpose of ascertaining, by testing or otherwise, whether the offence has been committed*;

(d) he may seize and detain any goods or documents *which he has reason to believe may be required as evidence in proceedings for an offence under this Act*;

(e) he may, for the purpose of exercising his powers under this subsection to seize goods, but only if and to the extent that it is reasonably necessary in order to secure that the provisions of this Act and of any order made thereunder are duly observed, require any person having authority to do so to break open any container or open any vending machine and, if that person does not comply with the requirement, he may do so himself. (Emphasis added.)

[21] Paragraphs (c) and (d) above gave full powers to officers of the first appellant to seize the respondent's goods for the purpose of ascertaining whether an offence under the TDA had been committed or which they had reason to believe might be required as evidence at the trial. There is no evidence that the seizure of the goods was made other than for those purposes.

[22] It was pointed out by learned counsel for the respondent that the search warrants were issued in the name of Lactovida (M) Sdn Bhd and not in the name of the respondent, implying of course that the seizure of the goods and equipment was done without reasonable or probable cause. With due respect to learned counsel, the suggestion is misconceived. The mere fact that the search warrant was not issued in the name of the respondent does not make the seizure of the goods illegal, for the following reasons:

(a) it is not a strict legal requirement under s 28(3) of the TDA that the search warrants must be issued in the name of the owner or occupier of the premises. The words used in the section are 'any premises';

(b) based on the company search of Lactovida (M) Sdn Bhd dated 2 March 2010, the registered address of the respondent was Lot S24 and S25, Tingkat 2 Wisma SEDCO Plaza Wawasan, which was also the registered address of Lactovida (M) Sdn Bhd;

(c) in its letter dated 12 January 2012 to the appellants, the respondent's letterhead used the address belonging to Lactovida (M) Sdn Bhd;

(d) apart from the lactovida products, there was no other product under the respondent's own brand that was found and kept at Wawasan Plaza and Kompleks Kilang SME premises;

(e) although the respondent was subsequently charged with an offence under s 3(1)(b) and not under s 3(1)(a) of the TDA as stated in the search warrant, this does not mean that the respondent could only be charged under s 3(1)(a);

(f) the offences under sub-s 3(1)(a) and (1)(b) are related offences as both relate to false trade description; and

(g) the respondent and Lactovida (M) Sdn Bhd had been jointly involved in the production and distribution of Lactovida drink and both companies never ceased operation even after the raid on 10 July 2009.

[23] In any event, even without a search warrant, the enforcement officers of the first appellant in circumstances falling under s 28(3A) of the TDA were empowered to enter and inspect any premises and seize any goods for the purpose of an investigation. It is therefore not the law that in every case, a search warrant must first be obtained from a magistrate before the enforcement officers could exercise their powers of search and seizure under the TDA.

[24] On the facts of the present case, we do not think it can be argued that the appellants had no reason to suspect that an offence under the TDA had probably been committed in relation to the goods seized, including those that were not used during the criminal trial of the respondent, based on the following facts:

(1) the seized goods had labelling and affixed statements which indicated false trade descriptions;

(2) no approval and/or certification was obtained from the relevant authorities with regard to such labelling and statements and the respondent did not exhibit any written approval from the relevant authorities;

(3) the reference number of the letter dated 12 August 2008 from the Ministry of Health was reproduced and affixed on the labels of the bottles of the goods as well as in the pamphlet/brochure of the respondent;

(4) no written approval was ever obtained from the Ministry of Health before the reference number was affixed on the labels of the bottles of the goods as well as the pamphlet/brochure;

(5) a statement 'Tested by SIRIM QAS' was on the labels of the bottles of the products as well as in the pamphlet/brochure of the respondent;

(6) no written approval was ever obtained from SIRIM QAS International Sdn Bhd before such statement was affixed on the labels of the bottles of the products in the pamphlet/brochure;

A (7) as shown in the pamphlet, the lactovida products were manufactured by Lactovida (M) Sdn Bhd at Lok Kawi Estate, Kota Kinabalu; and

(8) the tenancy agreement between the respondent and SME Bank clearly stated that 'Ruangan Kilang Digunakan HANYA untuk pembungkusan dan pengedaran minuman kesihatan 'Lactovida'. The premises was never meant to be used as a factory for manufacturing purposes;

[25] It is true that some of the bottles had no labelling that indicated false trade description, but that is not a bar for the enforcement officers of the first C appellant to seize them for the purpose of investigation. At the trial, it was put to the appellants' witness ('DW2') that he had no reasonable cause to believe that the goods and equipment seized would or could be used as evidence at the trial. DW2 emphatically denied the suggestion.

D **[26]** In our view, it would be premature at that stage of the investigation for the seizing officers to determine which goods were in breach of the TDA and which were not and which items would be used at the trial and which would not be used. The fact that the respondent was eventually acquitted of the E offence charged does not render the seizure illegal if otherwise it was made in accordance with s 28(1)(c) and (1)(d) of the TDA.

[27] Section 34 of the TDA is similar though not identical with s 48 of the Optical Discs Act 2000, which provides as follows:

F 48 No person shall, in any proceedings before any court in respect of any article, optical disc, thing, book or document seized in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause.

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[28] This court had occasion to deal with this provision in *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2013] MLJU 1644; H [2013] 7 CLJ 681. In affirming the decision of the High Court that the seizure of the goods was made with reasonable cause in the exercise of an investigative function, Zaharah Ibrahim JCA (now FCJ) delivering the judgment of the court, inter alia, said:

I (5) The appellant's claim for the declaration and damages could only succeed if the seizure was made without reasonable cause. On the facts, the said seizure was done with the reasonable belief that they contained information as to the commission of some offence, for which the search at the new premises was conducted. Further, the fact that, inter alia, the manufacturer's codes were issued for machines under a different licence for the old premises and used for machines installed in the new

premises were sufficient to constitute reasonable cause so as to deny the appellant the relief sought under s 48 of the Act.

[29] For all the reasons aforesaid, we must say, with due respect to the learned judge, that he was wrong in finding the appellants liable in damages for negligence for the seizure of the goods that the prosecution did not use at the trial of the respondent.

[30] We shall now deal with the respondent's appeal against the learned judge's decision to dismiss its claim for malicious prosecution. It was submitted that on the evidence before the court, the learned trial judge ought to have found that the claim for malicious prosecution had been proved against the appellants on the balance of probabilities. It was argued that the appellants had no reasonable or probable cause to set the criminal law in motion against the respondent.

[31] It was further argued that the appellants were actuated by malice, citing this court's decision in *Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492 (a defamation case) where, in dealing with the issue of malice, Mohd Ghazali JCA (as he then was) delivering the judgment of the court made the following observations at p 517:

> What is malice? According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'malice' means: ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. *But an act otherwise legal is not made wrongful by an improper motive* (*Mayor of Bradford v Pickles* [1895] AC 587). (Emphasis added.)

[32] In *Rawther*, the Federal Court laid down at least five elements for the successful prosecution of the tort of malicious prosecution. We reproduce below what the court said at p 203:

> In any such action the plaintiff must prove at least five things and unless he does so he cannot succeed. He must prove that the defendant set the criminal law in motion against him. He must prove the criminal proceedings against him terminated in his favour, that the defendant had no 'reasonable and probable cause' for setting the law in motion against him and that the plaintiff was actuated by malice in the sense that he had a motive other than only to carry the law into effect.

[33] The appellants' answer to the respondent's claim for malicious prosecution was that the claim was time barred by virtue of s 3 item 10 of the

Schedule to the Sabah Limitation Ordinance ('the Limitation Ordinance'), which stipulates that a claim for compensation for a malicious prosecution instituted after one year from the date of acquittal or the termination of the prosecution must be dismissed. In the present case, the respondent was acquitted on 29 April 2011 but the suit was only filed on 25 January 2013. There was therefore a delay of almost two years.

[34] Setting the criminal law in motion in the context of the tort of malicious prosecution means in our view the institution of a criminal prosecution by the public prosecutor and not the commencement of a criminal investigation by an enforcement agency. Item 10 of the Schedule to the Limitation Ordinance speaks of the acquittal or termination of a 'prosecution'. It does not speak of the termination of an 'investigation' by an enforcement agency.

[35] It is settled law that the power to institute criminal prosecution and the general control of criminal proceedings are vested in the public prosecutor, who is the ultimate and sole authority to decide whether or not any person is to be prosecuted for any offence known to law: *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152; [1974] 1 LNS 80 and *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66; [1977] 1 LNS 38. The first appellant's power on the other hand is purely investigative. He has no prosecutorial power.

[36] In the present case, it is obvious that the respondent's claim for malicious prosecution was predicated on the assumption that it was the first appellant who made the decision to institute criminal prosecution against the respondent. For the reason that we have mentioned in the preceding paragraph, nothing can be farther from the truth.

[37] The appellants' liability, if at all, is confined to the legality or otherwise of their act of seizing the goods, which as we said is an investigative function and not an exercise of prosecutorial power. It is therefore misconceived and futile for the respondent to argue that it was the first appellant who set the criminal law in motion by instituting the criminal prosecution against it for an offence under s 3(1)(b) of the TDA. This ground alone would have been sufficient for the learned judge to dismiss the respondent's claim for malicious prosecution.

[38] Even if the first appellant had such power of prosecution, or that it was the first appellant who set the criminal law in motion by commencing the criminal investigation against the respondent which led to its prosecution under the TDA, the respondent's claim for malicious prosecution was in any event barred by limitation as it was filed outside the limitation period prescribed by s 3 of the Limitation Ordinance.

[39] The learned judge however rejected the defence of limitation raised by the appellants on the ground that it was not included in the list of agreed issues. He was of the view that by not including the defence in the agreed issues, the appellants were deemed to have abandoned the defence.

[40] With due respect to the learned judge, this is erroneous. Pleadings operate to define and delimit with clarity and precision, the real matters in controversy between the parties upon which they can present their respective cases, and upon which the court will be called upon to adjudicate between them: see *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615. There is nothing on record to show that the appellants had abandoned their pleaded defence of limitation.

[41] Since the defence of limitation was pleaded, evidence was adduced in proof thereof and, more importantly, there was no question that the claim was filed out of time, the learned judge was right in the end in dismissing the respondent's claim for malicious prosecution. The law on limitation is strict. In the words of s 3 read with item 10 of the Schedule to the Limitation Ordinance, the claim 'shall be dismissed' if it was filed after one year from the date of acquittal or the termination of the prosecution.

Order accordingly.

Reported by Afiq Mohamad Noor